

FOC MAIL SECTION

BOOK 8 E-108-108

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 98M-16

80425

In Matter of

DISPATCHED WT DOCKET NO. 94-147

JAMES A. KAY, JR.

Licensee of one hundred fifty two
Part 90 licenses in the
Los Angeles, California area.

O R D E R

Issued: January 29, 1998

; Released: February 2, 1998

The latest pleading received from James A. Kay, Jr. ("Kay") is a Petition For Leave To File Appeal that was filed on January 26, 1998. There will be no responsive pleading requested of the Wireless Telecommunications Bureau. 47 C.F.R. §1.301(b).

Kay submits that based on the Presiding Judge's Order FCC 98M-14, released January 23, 1998, and comments during the Prehearing Conference of January 21, 1998, "the action of the Presiding Judge to micro-manage the deposition process in this case exceeds the bounds of the authority delegated to the Presiding Judge and will constitute reversible error resulting in future remand of the proceeding." For reasons stated below, it is concluded that Kay's Petition fails to raise a new or novel question of law or policy and none of the rulings complained of by Kay would constitute error that would be likely to require remand. 47 C.F.R. §1.301(b).

Most rulings at the Prehearing Conference of January 21 were made on-the-record as authorized by the Commission's rules. See 47 C.F.R. §298 (rulings may be made on the record). For the convenience of the parties and for later reference, the oral rulings were memorialized in Order FCC 98M-14, copies of which were faxed to counsel on January 22, 1998. At that time, counsel were preparing to take depositions in California from January 26 to February 2, 1998. The Prehearing Conference was called by the Presiding Judge to consider, inter alia, matters raised by Christopher Killian ("Killian") a non-party deposition witness who was noticed and subpoenaed by Kay for this round of depositions.¹ Killian had filed an Opposition to the scope of the deposition subject areas and documents. The Bureau also filed a Partial Opposition to Kay's notice to depose two Commission employees. The Commission had authorized the depositions but the Bureau objected to a list of documents that Kay was requesting from the employees which were similar to the documents asked of Killian and another non-party witness. Kay filed a Joint Reply to

¹ Another non-party witness subpoenaed by Kay was Frank Barnett. He was afforded essentially the same protection as was Killian in order to afford equal treatment to the witnesses.

Killian and the Bureau. These pleadings were considered by the Presiding Judge in advance of the Conference, which was scheduled immediately, and counsel's discussion and arguments were heard before any rulings.

Kay asserts that discovery limitations imposed by the Presiding Judge demonstrates an "aggressive posture in dealing with the depositions." In support of that conclusion Kay refers generally to six instructions in Order FCC 98M-14 and notes only specific concern about limiting lunch to 45 minutes. Kay does not acknowledge the fact that a full hour is allowed in the Order to break for lunch and return on the record. Nor does Kay argue that the time limit was unreasonable or burdensome. No one else has complained. The Presiding Judge was concerned about the interests of the witnesses who were hoping to be deposed in only one day or less. Extended lunches could interfere with the schedule to which the parties and their counsel have agreed and to which the witnesses have arranged their own personal schedules.²

Kay does not specify any other particular instruction as a basis for an interlocutory appeal and every single criticism will not be addressed. Most importantly, Kay does not deny that the Presiding Judge has the authority to prescribe deposition procedures. Kay asserts that there first must be some record demonstration of "discord and dispute" among the parties or counsel. There will not be a search made of the depositions and transcripts in this case to document an instance of "discord or dispute". It appears thus far that with the active supervision of the Presiding Judge, issues which could have arisen at these out-of-town depositions were anticipated and rules of the road that were developed in conference with all counsel present and participating might have been successful to dispel any incipient discord or dispute. The Presiding Judge was not "conceding" but was commending all counsel for acting properly in the December round of depositions which was also preceded by a Prehearing Conference and resulting Order FCC 97M-198 and FCC 97M-200.

Without specifying any of the six specific instructions, except for the 45 minute lunch limitation that was actually an authorized hour break, Kay would have an appeal certified to the Commission on whether the Presiding Judge's instructions for depositions "exceeds the Presiding Judge's authority and the Commission should be asked to rule as to whether he has done so." Kay acknowledges that a Presiding Judge has a role in supervising discovery, citing Discovery Procedures, 11 F.C.C. 2d 185 (1968). Kay quotes the segment of the general authority delegated by the Commission which is to limit the use of any of the discovery procedures where "their use will not contribute to the proper conduct of the proceeding." Id. at 187. However, the same paragraph further provides for the prevention of "abuse of parties or witnesses." Id. It was through the appearance of counsel for Killian and the pleadings seeking protection that were filed by Killian that prompted a reasonable concern for third party witnesses. The Bureau had been seeking access to over 100

² Since that subject was not specifically discussed at the Prehearing Conference, if a witness expresses a need or desire for a longer lunch break and all counsel are in accord, it would be permissible to take a slightly longer period of time.

depositions that were taken of persons involved with lawsuits that Kay had brought in state court. Thus, there was a sense of reality that depositions could possibly become at least marginally discordant or disputative.³

And recall the Commission's admonition to the Presiding Judge who "in accordance with his broad discretion under [§1.313], will take any action that would be appropriate to avoid any demands on the three Commission employees that would significantly interfere with their ability to discharge their regular duties." Order FCC 97-412 at Para. 5, released December 18, 1997. One Commission employee is traveling from the State of Washington to California for the purpose of being deposed by Kay. He would need to return to his regular Commission duties as soon as possible. Thus, an hour lunch break made sense to accommodate his schedule.

In general, Kay argues that these instructions of the Presiding Judge have limited Kay's ability to secure relevant evidence. There are no specifics given to support that assertion. Discovery has been in progress since early 1995, and this is the first assertion of an incumbrance resulting from instructions of the Presiding Judge in orders related to discovery that are alleged to exceed his authority. There was no such complaint raised in a status report that was submitted after the December depositions and there was no such complaint by Kay's counsel at the Prehearing Conference.

Finally, Kay objects to references made by the Presiding Judge to the Federal Rules of Evidence ("FRE") in rulings which narrow the scope of discovery to the issues in this case and which prohibit using the discovery process to seek extrinsic evidence on credibility, a practice which if allowed might lead to the "fishing expedition" of which Killian was concerned. These references to the FRE have proved useful in the past in defining for counsel the intended scope of rulings. The FRE provide a ready reference for which there is a common knowledge and appreciation. Kay would prefer limiting rulings of the Presiding Judge to the broad definition of discovery found in treatises as "any matter that is relevant." But that extremely broad standard is only a definition of the broad concept of discovery. It is not of use in limiting discovery requests that could result in "undue delay, waste of time, or needless presentation of cumulative evidence." See FRE 403. In practice, the Commission realized as early as 1968, that if such breadth of discovery were allowed without supervision by Presiding Judges, the hearing process would not function.

In conclusion, it is determined that Kay has not made a sufficient showing to certify the questions he raises to the Commission. There is no new or novel questions raised, and there is no likelihood that the Commission

³ Killian and his wife had been deposed by Kay in one of those state actions and apparently they were upset by the experience. But no conclusion has been reached by the Presiding Judge that the Killians were abused or treated harshly.

will remand his case for any rulings made at the Prehearing Conference of January 21, 1998, or in Order FCC 98M-14, released January 23, 1998.⁴

Ruling

Accordingly, IT IS ORDERED that the Petition For Leave To File Appeal that was filed on January 26, 1998, by James A. Kay, Jr., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION⁵



Richard L. Sippel
Administrative Law Judge

⁴ It might be helpful if counsel agreed to an informal set of rules for deposition taking that covered such questions as lunch hours. The terms agreed to could be briefly noted in the next status report that is due on February 13, 1998. (Tr. 416.)

⁵ Courtesy copies of this Order were faxed or e-mailed to counsel for the Bureau, counsel for Kay, and counsel for Killian on the date of issuance. The Bureau will undertake to fax a copy of the Order to Mr. Barnett as soon as possible.